IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.3589 OF 2003

IN

SUIT NO.3796 OF 2003

Kunal Prasanna Kirtikar & another. ...Plaintiffs.

vs.

1. M/s.Meghdhaval Constructions & others. ...Defendants.

Mr.S.C.Naidu i/b. S.I.Memon, for Plaintiffs.

Mr.J.S.Kini, for Defendant nos.1 to 3.

Mr.K.A.sampat, for Defendant nos.4 to 6.

CORAM: D.K.DESHMUKH,J.

DATED: 12th January, 2007.

P.C.:-

1. This is a notice of motion taken out by the plaintiffs for interim orders in relation to four flats i.e. flat nos.101 & 102, out of which flat no.101 is occupied by the defendant nos. 4 and 5 and flat no.102 is occupied by the defendant no.6, as also in relation to flat

nos.201 and 202 in the same building viz. Shanti Kunj situated on Plot no.255, Plot CTS No.E/472, 12th Road, Khar (West), Mumbai-400052. The flat nos.201 and 202 are under the lock and key of defendant nos.1, 2, and 3. So far as flat nos. 101 and 102 are concerned, the defendant nos. 4, 5 and 6 are agreeable to have an order of temporary injunction being made in relation to their flats in terms of prayer clause (c) and (d) excluding bracketed portion. Therefore, by consent of plaintiffs and defendant nos.4, 5 and 6, the notice of motion is granted in so far as defendant nos. 4, 5 and 6 are concerned in terms of prayer clause (c) and (d) excluding bracketed portion. The learned Counsel appearing for defendant nos.4, 5 and 6 states that defendant nos. 4 and 5 will pay to the plaintiffs without prejudice to their rights and contentions in the suit an amount of Rs.3,69,000/- (Rupees three lakhs Sixty Nine thousand only) within a period of one month from today towards occupation charges for the period from the year 1993 till December,2006 at the rate of Rs.2250/- per month and that the defendant no.6 will also pay identical amount at the same rate for the same period to the plaintiff again without prejudice to his rights and contentions in the suit, within four weeks from today. The learned Counsel appearing for defendant nos. 4, 5 and 6 states that the defendant nos.4, 5 and 6 will continue to pay to the plaintiffs the amount at the rate of Rs.2250/- per month for each flat during the pendency of the suit until further orders of the Court. He also states

that the defendant nos. 4, 5 and 6 shall also pay proportionate outgoings of their flats (i.e. 1/8th each) until further orders of the Court. The payment of outgoings shall be made from the month of January,2007. The payment of outgoings shall be made by the defendant nos. 4, 5 and 6 to the plaintiffs on the plaintiffs' intimating to them the amount of outgoings and the payment shall be made within a period of two weeks from the date of receiving intimation. The statements are accepted.

2. The learned Counsel appearing for plaintiffs states that the plaintiffs will receive the payment from the defendant nos. 4, 5 and 6 as per their statement without prejudice to their rights and contentions in the suit. The statement is accepted.

3. In view of these statements no further interim orders are necessary to be made in so far as flat nos. 101 and 102 are concerned.

4. So far as flat nos. 201 and 202 are concerned, they are under the lock and key of defendant nos. 1,2 and 3. Defendant nos.1, 2 and 3 are the builders who has constructed the building pursuant to the agreement between the plaintiffs and the defendant no.1. The case of the plaintiffs is that as per the agreement between the parties the defendant no.1 builder was permitted to enter the property as a

licensee only for the purpose of erection of construction. He was to select the prospective tenants and in case those prospective tenants are approved by the plaintiffs, they were to be given possession of the flats in the building. According to the plaintiffs, there is no clause in the agreement which permits the builder to be in possession of any of the constructed portion. Thus, according to the plaintiffs, the defendant nos. 1,2 and 3 have no authority to be in possession of flat nos. 201 and 202.

5. According to the defendant nos.1, 2 and 3, however, they are entitled to be in possession of the flats because they have constructed the building by spending money from their own pocket and therefore, they cannot be prevented from being in possession of the flats which are constructed by them. Defendant nos. 1, 2 and 3 also relied on clause (8) of the agreement between the parties which is at "Exhibit F". That clause contemplates that the builder will be in possession during the construction period and it is the builder who will put the owners in possession of the flats. Therefore, according to the defendant nos. 1,2 and 3 the builder is entitled to be in possession of the flats.

6. The relationship between the plaintiffs and defendant nos. 1, 2 and 3 is governed by the Agreement at Exhibit F. Perusal of that

agreement shows that the defendant no.1 was permitted to enter the property as a licensee for the purpose of raising construction. There is no clause in the agreement which permits the builder to be in possession of any of the constructed portion. Therefore, as admittedly the plaintiffs are the owners of the property i.e. the land and the building standing thereon, unless there is any clause in the agreement which specifically confers authority on the defendant no.1 to be in possession of the constructed building, they cannot be permitted to be in possession. In any case, it is common ground that even defendant nos. 1, 2 and 3 are not actually occupying the flats. They are lying vacant under the lock and key of defendant nos. 1,2 and 3. As the suit is pending and the rival rights claimed by the parties are to be worked out by the Court, the defendant nos. 1, 2 and 3 cannot be permitted to dispose of those flats. Therefore, in my opinion, if the flats cannot be permitted to be disposed of either by the plaintiffs or by the defendant nos. 1,2 and 3 and as the flats are not actually occupied by the defendant nos. 1,2 and 3 and are lying vacant, the workable arrangement that can be made for the benefits of all the parties involved, would be to see that the property fetches some profit which will be to the benefits of all the parties. In my opinion, therefore, the appropriate order that can be passed would be to appoint Receiver in relation to flat nos.201 and 202 with direction to appoint agent to be in possession of those flats so that from the amount of agency, outgoings

of the flats can be paid. Presently, the outgoings are being paid by the plaintiffs while the flats are lying vacant.

7. In this view of the matter therefore, the notice of motion is granted in terms of prayer clause (b). Receiver is directed to take physical possession of the flats from the defendant nos.1,2 and 3 and thereafter take steps to appoint agent to be in possession of the flats on usual terms and conditions including royalty and security. From the amount of royalty received, the Receiver shall pay the outgoings of the flats and shall invest the balance amount in fixed deposit in a nationalised bank.

8. It is agreed between the parties that without prejudice to rival rights and contentions the plaintiffs can apply to Bombay Municipal Corporation for occupation certificate at their own costs. At the request of defendant nos. 1,2 and 3, the Receiver is directed to take possession after expiry of period of four weeks from today.